U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF I-S-, INC.

DATE: DEC. 13, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a software development and consulting services company, seeks to employ the Beneficiary as a senior software engineer. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based "EB-2" immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition on the ground that the Beneficiary did not meet the educational requirement of the labor certification.

On appeal the Petitioner asserts that the evidence already in the record establishes that the Beneficiary's educational qualifications meet the terms of the labor certification.

Upon *de novo* review, we find that the Beneficiary's educational credentials meet the requirements of the labor certification. Accordingly, we will withdraw the Director's finding to the contrary. However, we will remand the case for further consideration of the Petitioner's ability to pay the proffered wage and whether the Beneficiary meets the experience requirement of the labor certification. The Director shall then issue a new decision.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of U.S. workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. ANALYSIS

A. Petitioner's Ability to Pay the Proffered Wage

To be eligible for the classification it requests for the beneficiary, a petitioner must establish that it has the ability to pay the proffered wage stated on the labor certification. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

> The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records may be submitted by the petitioner or requested by [USCIS].

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date[1] of the petition onward. In this case the proffered wage is $99,050 per year and the priority date is June 9, 2014.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage.

If a petitioner does not establish that it has paid the beneficiary an amount equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would ordinarily be considered able to pay the proffered wage during that year.

In this case the record indicates that the Beneficiary began working for the Petitioner in January 2015. The record includes copies of two Forms W-2, Wage and Tax Statements, issued by the

[1] The "priority date" of a petition is the date the underlying labor certification application is filed with the DOL. *See* 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied from the priority date onward.

Petitioner showing that the Beneficiary received "wages, tips, other compensation" of $109,729.89 in 2015 and $61,679.16 in 2018. While this evidence establishes the Petitioner's ability to pay the proffered wage in 2015, it does not do so for 2018. No Forms W-2 have been submitted for 2016 or 2017, and the Beneficiary was not employed by the Petitioner in 2014. Thus, the Petitioner has not established its ability to pay the proffered wage from the priority date of June 9, 2014, onward based on wages paid to the Beneficiary.

The record includes copies of the Petitioner's federal income tax returns, Forms 1120S, U.S. Income Tax Return for an S Corporation, for the years 2014, 2015, and 2017.[2] As recorded in the tax returns, the Petitioner had net income[3] of $175,320 in 2014, $188,876 in 2015, and $150,274 in 2017, and net current assets[4] of $816,080 in 2014, $824,180 in 2015, and $993,873 in 2017. Thus, the Petitioner's net income and net current assets both exceeded the proffered wage in 2014, 2015, and 2017. However, since the record does not include copies of the Petitioner's federal tax returns for 2016 and 2018, the Petitioner has not shown that its net income or net current assets exceeded the Beneficiary's proffered wage in every tax year since the priority date.

Moreover, when a petitioner has filed other I-140 petitions, it must establish that its job offer is realistic not only for the instant beneficiary, but also for its other I-140 beneficiaries. A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). Accordingly, a petitioner must demonstrate its ability to pay the combined proffered wages of the instant beneficiary and every other I-140 beneficiary from the priority date of the instant petition until the other I-140 beneficiaries obtain lawful permanent resident status. *See Patel v. Johnson*, 2 F.Supp. 3d 108, 124 (D.Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). USCIS records show that the Petitioner has filed multiple I-140 petitions for other beneficiaries. Therefore, the Petitioner must establish its ability to pay the instant Beneficiary as well as the beneficiaries of the other I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition.[5]

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[2] The 2014 and 2015 tax returns were submitted as part of the initial evidence supporting the instant petition which was filed in 2016, thereby meeting the initial evidence requirement in 8 C.F.R. § 204.5(g)(2). The 2017 return was submitted in support of subsequent petition (receipt number [redacted]) filed in 2019.

[3] If an S corporation, like the Petitioner, has income exclusively from a trade or business, USCIS considers its net income (or loss) to be the figure for "Ordinary business income (loss)" on page 1, line 21, of the Form 1120S. However, if there are relevant entries for additional income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K of the Form 1120S, and the corporation's net income or loss will be found in line 18 of Schedule K ("Income/loss reconciliation").

[4] For a corporation net current assets (or liabilities) are the difference between its current assets, entered on lines 1-6 of Schedule L, and its current liabilities, entered on lines 16-18 of Schedule L.

[5] The Petitioner's ability to pay the proffered wage of each of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the instant petition or the I-140 petition filed on behalf of the other beneficiary, whichever is later.

There is incomplete evidence in the record concerning the Petitioner's other I-140 beneficiaries, and the Director has not requested any such evidence in this proceeding. Accordingly, we will remand this case to the Director for the purpose of requesting additional evidence from the Petitioner and, based on its response thereto, determining whether the Petitioner can establish its continuing ability to pay not only the Beneficiary's proffered wage, but the proffered wages of its other I-140 beneficiaries as well from the priority date of June 9, 2014, onward.

B. Beneficiary's Experience

To qualify for the requested classification of advanced degree professional, the Beneficiary must meet the specific educational, training, experience, and other requirements of the labor certification. *See* 8 C.F.R. § 204.5(k)(4)(i). In this case the labor certification requires, in addition to the minimum educational requirement of a U.S. bachelor's degree in computer science, engineering, or business administration, or a foreign educational equivalent, an experience requirement of at least 60 months of employment as either a [redacted] consultant, or a technical lead, or an associate consultant, or a developer. The regulation at 8 C.F.R. § 204.5(g)(1) provides, in pertinent part, that:

> Evidence relating to qualifying experience . . . shall be in the form of letter(s) from current or former employer(s) . . . and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien . . . .

In this case the Petitioner claims that the Beneficiary fulfilled the experience requirement of the labor certification by working for [redacted] in [redacted] India, as a technical lead from August 2004 to April 2014. As evidence of such employment the Petitioner has submitted copies of:

- A certificate on the letterhead of [redacted] dated May 23, 2014, and signed by [redacted], "Authorized Signatory, Separations [*sic*] Team," stating that the Beneficiary was employed as a technical lead from August 2004 until his resignation in April 2014;
- Another certificate on the letterhead of [redacted] dated December 13, 2018, once again bearing the signature of [redacted] "Authorized Signatory, Separation Team," confirming the Beneficiary's job title and dates of employment from 2004 to 2014, and describing his job duties.

This documentation does not meet the substantive requirements of 8 C.F.R. § 204.5(g)(1) because neither certificate identifies the writer's title. [redacted] is identified simply as the authorized signatory of the separation team, which provides little or no information about his (or her) actual position in [redacted]

On remand, therefore, the Petitioner should request additional evidence about the Beneficiary's alleged employment with [redacted] that meets the requirements of 8 C.F.R. § 204.5(g)(1).

III. CONCLUSION

The Petitioner has established that the Beneficiary meets the educational requirements of the labor certification. We will remand this case to the Director for further consideration of the Petitioner's ability to pay the proffered wages of the instant Beneficiary and its other I-140 beneficiaries, and whether the Beneficiary meets the experience requirement of the labor certification.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

Cite as *Matter of I-S-, Inc.*, ID# 4266737 (AAO Dec. 13, 2019)